History and Theory

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It has been a great privilege to have been drawn into Bob Cover's world on several occasions. Just a little more than a year ago, we were part of a seminar studying questions of Community, Citizenship, and Jewish Law in Jerusalem. Yet it was as a legal historian that I felt the greatest connection to Bob. His *Justice Accused*[1] was a remarkable inspiration to those of use who have felt the chasm between law and justice in American law schools and have been aware of the ways in which positivism in philosophy and history has legitimated this separation through a pseudo-scientific understanding of the human condition. By highlighting the connection between his own anti-Vietnam War convictions and his study of the moral and psychological dilemmas of anti-slavery judges, he turned history into complex questions of moral responsibility, not capable of being evaded by the restrictive definitions of professional role that both law professors and historians regularly bring to their tasks.

Anglo-American legal history has remained divorced from questions of legal and political theory. Just as Anglo-American legal theory since Bentham and Austin has been notoriously ahistorical—encouraging each generation of theorists to search anew for universal truth untempered by the need to account for historical variation and contingency—so too Anglo-American legal history has been persistently untheoretical. Legal historians unfortunately have associated objectivity with a brand of untheoretical antiquarianism. Yet, since political and legal theory are intimately involved in issues of legitimation of the way things are, and of how we got to where we are, they inevitably draw legal history into the debate over how we arrived at the present and whether there are "lessons" that can be learned from the past. Many of the interpretive issues in legal history implicitly raise questions similar to those in legal and political theory: whether there is a pattern of conflict versus consensus, continuity versus discontinuity, and whether the way things are is the way they had to be.

Many of the great legal historians never explicitly addressed the theoretical issues to which their work was linked. Only after three quarters of a century do we see clearly that Maitland's inquiry into early feudal forms of property was intimately related to the then raging theoretical

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1. R. COVER, JUSTICE ACCUSED (1975).

debate about *Gemeinschaft* and *Gesellschaft*.[2] Maitland's legal history was closely tied to a defense of Liberal individualism against collectivists on both Left and Right, who claimed that status-based, pre-modern forms of property had been spared from the influences of atomistic individualism. But for some reason he never wished to let us in on the secret.

Only many years later does one appreciate that Paul Samuel Reinsch's Thesis, that American colonial law substantially broke from the English common law tradition,[3] was an application of the Frontier Thesis of his mentor, Frederick Jackson Turner.[4] Turner's Frontier Thesis favored environmental determinism over widely shared conceptions of an Anglo-Saxon national character[5] as the motive force of historical development, and it presented American history as a sharp break with the past, not as a gradual social Darwinist evolution. Since Turner and his disciples regarded Eastern cultural hegemony as based on Eastern claims to be the direct heirs to a stratified English culture, it is not surprising that they should have insisted that American democratic law broke decisively with English ways.[6] However, Reinsch also implicitly attacked the conservative Anglophilic content of the Langdellian method, its belief that the life of the law has been logic, and its evolutionist theory of the common law.[7] Yet, though much ink was spilled over whether the seventeenth century pleadings in Massachusetts and the King's Bench were the same or different, no one stopped to ask what was at stake in proving or disproving the Reinsch Thesis.

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2. I. VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 147-48 (1920); Sugarman & Rubin, *Towards a New History of Law and Material Society in England 1750-1914*, in LAW, ECONOMY AND SOCIETY 1750-1914: ESSAYS IN THE HISTORY OF ENGLISH LAW 28-30 (D. Sugarman & G. Rubin eds. 1984); *see* C. FIFOOT, FREDERIC WILHELM MAITLAND 231-39 (1971); Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 179-80 (1985); White & Vann, *The Invention of English Individualism: Alan MacFarlane and the Modernization of Pre-Modern England*, 8 SOC. HIST. 345, 352-54 (1983).

3. *See* Reinsch, *English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907); *see also* Chafee, *Colonial Courts and the Common Law*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 53, 64-65, 72-76, 78-79 (D. Flaherty ed. 1969) (discussing Reinsch thesis); Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 448 (1931) (arguing that "frontier theory . . . gave us legal institutions which the common law never succeeded in smothering").

4. *See* F. TURNER, *The Significance of the Frontier in American History*, in THE FRONTIER IN AMERICAN HISTORY 1-38 (1920).

5. *See* R. BILLINGTON, FREDERICK JACKSON TURNER 108-31 (1973); *see also* Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679, 679 (1984) (discussing Turner's equation of open frontier with values of "democratic individualism").

6. *See* R. BILLINGTON, *supra* note 5, at 108-31.

7. For a reconstruction of the premises of the Langdellian system, see Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

I. *LOCHNER* AND THE SUBSTANCE-PROCEDURE DISTINCTION

The debate over the character of American constitutional jurisprudence in the late nineteenth and early twentieth centuries—the period of the so-called *Lochner* Court[8]—dramatically illustrates the way in which arguments in legal history serve as proxies for more general controversies in legal and political theory. To a surprising extent, the picture we have of the Court between 1880 and 1937 is the product of winners' history. There is no more widely accepted dogma in American constitutional history than that *Lochner* resulted from the late nineteenth century Supreme Court's radical reversal of American constitutional premises.[9] According to the conventional position, the Court maintained a continuity of view until the 1880's. The decisions of the *Lochner* Court were said to depart abruptly from the heretofore consistently followed norms of constitutional decisionmaking.

In retrospect, however, there is an astonishing continuity in the Supreme Court's underlying vision during its first 150 years. The substantive due process of the *Lochner* era seems more like an extension of John Marshall's contracts clause jurisprudence[10] and antebellum state court decisions under takings clauses[11] than some sharp discontinuity in constitutional ideology. Far from being an anomaly, the creation of anti-redistributive constitutional checks on legislatures has taken multifarious paths in American constitutional law.

By viewing *Lochner* through the lens of the current debate over the Republican or Liberal character of American constitutional thought,[12] we

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8. For critical discussion of the *Lochner* era, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 427-55 (1978); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937-43 (1973).

9. *See, e.g.*, S. FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE 126-64 (1956); C. JACOBS, LAW WRITERS AND THE COURTS 85-93 (1954); A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 209-21 (1976); B. TWISS, LAWYERS AND THE CONSTITUTION (1962).

10. *See* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); Fletcher v. Peck 10 U.S. (6 Cranch) 87 (1810).

11. Bloodgood v. Mohawk & H.R.R., 18 Wend. 9 (N.Y. 1837); Beekman v. Saratoga & S.R.R., 3 Paige Ch. 45, 57 (N.Y. Ch. 1831); Gardner v. Trustees of Newburgh, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816); Raleigh & G.R.R. v. Davis, 19 N.C. (2 Dev. & Bat.) 451, 459-61 (1837).

12. For the classic recent works, see B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST AND THE FOUNDATIONS OF LIBERALISM (1986); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 1 (1986). The current state of the debate is surveyed in Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. (3d s.) 20 (1986); Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. (3d s.) 3 (1986); Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 116 (J. Higham & P. Conkin eds. 1979); Shalhope, *Republican and Early American Historiography*, 39 WM. & MARY Q. (3d s.) 334 (1982); Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in Ameri-*

can focus more clearly on the nature of the holding in that case and on its subsequent reinterpretation. An earlier generation interpreted the post-bellum rise of laissez-faire and its incarnation in the *Lochner* decision as fueled by a desire to let the free market trump protective governmental regulation.[13] The revisionists see instead a continuation of the Jacksonian Liberal vision of a neutral state that would prevent "the interests" from using government to feather their own nests.[14] Justices Cooley and Miller revealed their Jacksonian roots, for example, in the *Municipal Bond Cases*,[15] where they argued that the anti-laissez-faire position was being used by the railroads to get a larger share of the pie.[16] The *Income Tax Case* of 1895,[17] although framed in more technical constitutional terms, ultimately expressed the view that any progressive (and hence redistributive) income tax was illegitimate.[18] But that view, I believe, has its deep roots in the Liberal conception of a neutral state that first began to emerge in early American constitutional history and was developed and elaborated over the course of the nineteenth century.[19]

The late nineteenth century insistence on a neutral state that was, above all, anti-redistributionist arose simultaneously out of a conservative fear that the state might be used as a levelling device *and* a Progressive fear that the state was becoming the instrument not only of the wealthy and the powerful, but also of corrupt city political machines.

The rise of the Regulatory Welfare State in the twentieth century represented a fundamental assault on this widely shared constitutional ideal. Convinced that a redistributionist state was both necessary and just in an industrial society in which inequality and oppression were increasing, twentieth century Progressives sought to delegitimate the anti-redistributionist picture of the neutral state. In Europe, as Schumpeter showed so brilliantly in his *The History of Economic Analysis*, the challenge to Liberalism's assumption of neutrality focused on questions of economic policy: the progressive income tax in the English budget of 1911, the gold standard versus governmental interference with the money sup-

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can Historiography, 29 WM. & MARY Q. (3d s.) 3 (1972).

13. *See* sources cited *supra* note 9.

14. *See* L. GOODWYN, DEMOCRATIC PROMISE 375-79 (1976).

15. *See* C. FAIRMAN, RECONSTRUCTION & REUNION, 1864-1888, at 918-1116 (1971) (vol. 6 of Holmes Devise *History of the Supreme Court of the United States*).

16. *See* Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767, 790-94; Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865-1885*, 10 AM. J. LEGAL HIST. 97, 103-04, 110 (1966); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 973, 993-94 (1975).

17. Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895).

18. *See* A. PAUL, *supra* note 9, at 185-220.

19. *See* Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meanings and Origin of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985).

ply, the tariff versus free market policy.[20] All of these debates identified neutrality with the "natural" self-executing market economy. But, as is so typical in American history, here the central arena of controversy over the Liberal idea of the neutral state was constitutional law. It was here that Progressive historians and their New Deal successors challenged the *Lochner* Court's assumption of neutrality.

If we look at how the arguments developed, we will see, I think, the exact moment at which the meaning of the *Lochner* era was mystified and misrepresented. There were, roughly speaking, two lines of attack, two delegitimating strategies. The first was the argument that democracy required judicial restraint. Drawing on Thayer's famous 1893 essay,[21] the Progressives argued not only that judicial review was undemocratic but that the *Lochner* Court had departed from a well established historical baseline of judicial restraint. Thousands of pages were written purporting to demonstrate that, under the influence of either natural law[22] or mechanical jurisprudence,[23] the Supreme Court had violated precedent, converted procedural into substantive due process, and subverted the ideal of judicial restraint.[24]

The second line of attack focused not on questions of institutional legitimacy but on the substantive premises that lay behind the Liberal idea of a neutral state. How could the free market conceptions that made freedom of contract a constitutional ideal be defended in light of the vastly unequal market power existing between unorganized labor and increasingly concentrated corporate capital? How could there be a coherent distinction between the state and the market (or between public and private realms) when cartelization was creating private economic power that made public power pale in comparison? How could there be a vital, effective, flourishing democracy, they asked, when prevailing constitutional doctrine legitimated a society growing ever more unequal in wealth and power?[25]

The first line of attack prevailed and was drawn into the mainstream of constitutional discourse in its 1950's Legal Process-Neutral Principles mode.[26] This theory built on previously established assumptions of consti-

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20. J. SCHUMPETER, THE HISTORY OF ECONOMIC ANALYSIS 759-71 (1954).

21. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

22. *See* E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1929); C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931).

23. *See* Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

24. L. BOUDIN, GOVERNMENT BY JUDICIARY (1932).

25. *See* Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

26. For the classic statements of the legal process school, see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); H. Hart & A. Sacks, The Legal Process

tutional historians that the *Lochner* Court represented some special aberration which a more neutral constitutional theory could address and correct.[27] The procedural tack allowed New Deal thinkers to explain their revolution opportunistically. It was represented not as the justifiable overthrow of anachronistic nineteenth century Liberalism, whose conception of an anti-redistributive state was incompatible with the moral and political premises of a Regulatory Welfare State. Instead, it was portrayed as a healthy and normal corrective to a *Lochner* Court that itself had strayed from an historically neutral baseline of democracy and judicial restraint. For the past fifty years, there has been a symbiotic relationship between constitutional legitimation of the New Deal and delegitimation of the *Lochner* Court.[28]

The delegitimating argument that the New Deal constitutional historians chose had clear strategic advantages. It is more difficult to justify a constitutional revolution on substantive than on procedural grounds, easier to claim that one is restoring the neutral and natural according to some meta-historical baseline of neutrality. Wherever legitimacy is defined by law, there will be a clear advantage to those who argue for continuity or the restoration of continuity over discontinuity, and a benefit to those who mask—both to themselves and others—the existence of any changes they institute. It is more difficult to justify great changes as desirable than to represent them as a return to some Golden Age.

Any powerful substantive vision of what made the change imperative, however, is lost by such a form of justification. We have gradually lost touch with the reasons why the idea of a neutral state was incoherent and depended on unsupportable background assumptions about the relationships between state and society, public and private law, freedom and coercion, rights and duties. Some of our most prominent legal thinkers have returned virtually unchallenged to *Lochner* Court assumptions,[29] in part because for almost fifty years constitutional historians have taught that the dispute was over disembodied institutional ideas of legislative power and judicial restraint, not over law as the embodiment of substantive visions of the good society.[30]

(tent. ed. 1958), and for a criticism of that mode, see Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1183-87 (1985).

27. *See* S. FINE, *supra* note 9, at 162-64; B. TWISS, *supra* note 9, at 130-40; Pound, *supra* note 23, at 616.

28. *See supra* note 9 and accompanying text.

29. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

30. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980).

II. Republicanism Versus Liberalism

The current debate over whether early American political and constitutional thought is more aptly characterized as Republican or Liberal[31] promises to spark renewed consideration of the entire body of American constitutional history. I believe there is an important line of development between the Liberal ideal of a neutral, night-watchman state of Madison's Tenth *Federalist*[32] and the ideas of neutrality that were most elaborately expressed in the Classical legal thought of the *Lochner* era. Moreover, the Republicanism-Liberalism schism in early American thought probably continues along some of its axes into the present day.

What contemporary issues are at stake in the Republicanism-Liberalism debate? Perhaps the best way to approach this question is through a brief—and superficial—intellectual history of the dispute.

Bernard Bailyn, J.G.A. Pocok, and Gordon Wood are the names most often associated with the resurgence of an emphasis on Republican political thought.[33] But even before them, Karl Polanyi stressed the normative aspect of the thought of Adam Smith.[34] The recent publication of Smith's *Lectures on Jurisprudence*[35] strikingly confirms that, unlike that of his successors, Smith's thought was rooted in a conception of political economy which started from not only a labor theory of value but, more important, a self-consciously normative political culture that subordinated economic to political ideas.[36] The *Lectures* place Smith clearly in the great line of Republican political sociologists from Montesquieu to Tocqueville.[37] But, even more important, they underline the late eighteenth century Republican theory of law as constitutive, and creative, of political culture.[38] Smith explains the shift from feudal to liberal ideas of property not as the unfolding of economic necessity, but as the self-conscious use of law to perfect and improve society and human nature. No wonder that Jefferson repeated over and over again that Smith was one of his intellectual heroes.[39]

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31. *See* sources cited *supra* note 12.
32. The Federalist No. 10 (J. Madison).
33. *See* B. Bailyn, *supra* note 12; J.G.A. Pocock, *supra* note 12; G. Wood, *supra* note 12.
34. K. Polanyi, The Great Transformation 111–12 (1944). This aspect of Smith's thought has been brought forward by Garry Wills. G. Wills, Inventing America 102–03, 129–30, 209, 231–32, 254, 289 (1978).
35. A. Smith, Lectures on Jurisprudence (R. Meek, D. Raphael & P. Stein eds. 1978).
36. *Id.* at 464–72, 524–26.
37. For a thorough discussion of the links between the thought of Montesquieu and Tocqueville, see 1 R. Aron, Main Currents in Sociological Thought 188–90, 200–01, 204–05, 210, 230 (1965).
38. *See* Nedelski, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution* (Book Review), 96 Harv. L. Rev. 340, 350–51 (1982).
39. *See, e.g.*, 16 The Papers of Thomas Jefferson 449 (J. Boyd ed. 1961) ("In political oeconomy [sic] I think Smith's wealth of nations [sic] the best book extant.").

One issue in the Republicanism-Liberalism debate is the status of positivism, or the separation of facts and values. Beginning in the 1950's, Straussians have been attacking both Marxism and Liberal instrumentalism from the Right.[40] J.G.A. Pocock's appeal to the tradition of civic virtue resonates with these anti-positivist appeals to an Aristotelian community; politics is not a superstructure or the battleground for atomized individuals but an independently vital form of human fulfillment and development.[41] Similarly, Bernard Bailyn's work is primarily directed against Beardianism in American history and, to the extent that Beard is a stand-in for Marx, to the reductionist base-superstructure methodology of orthodox European Marxism.[42] By emphasizing *ideological* origins, Bailyn insists on the autonomy of ideas and cultural traditions.[43] And, like Pocock, he provides a path out of instrumental social science's use of class or interest group explanations of social change. If Bailyn's work has a conservative spin because of his sense that revolutionary ideology bore a distorted or pathological relationship to reality,[44] Gordon Wood's great book[45] sought to relegitimate the Beardian social conflict model without returning to its simple reductionist premises. Along with Pocock, Wood was the first writer to see that Republicanism was a truly coherent political alternative to Liberalism in American thought.

Liberalism has stood for a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society, a night-watchman state, and denial of any conception of an autonomous public interest independent of the sum of individual interests. Republicanism has stood for the primacy of politics and the relative independence of ideals of the good life from economic forces. It has emphasized the growth and development of human personality in active political life. It has proceeded from some objective conception of the public interest and conceived of a state that could legitimately promote virtue.[46]

When one asks who were the Liberals in 1789 and who were the Republicans, however, the argument becomes endlessly complex. Only

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40. *See* L. STRAUSS, NATURAL RIGHT AND HISTORY (1953).

41. *See* K. POLANYI, *supra* note 34; Pocock, *Cambridge Paradigms and Scotch Philosophers: A Study of the Relations Between the Civic Humanist and the Civil Jurisprudential Interpretation of Eighteenth-Century Social Thought*, in WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 235, 248–49 (I. Hont & M. Ignatieff eds. 1983).

42. *See* R. HOFSTADTER, THE PROGRESSIVE HISTORIANS 443 (1968); Wood, *Rhetoric and Reality in the American Revolution*, 23 WM. & MARY Q. (3d s.) 3, 22 (1966).

43. B. BAILYN, *supra* note 12.

44. *See* B. BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1974).

45. *See* G. WOOD, *supra* note 12.

46. This Republican legal tradition is still in need of further elaboration, despite Kent Newmyer's admirable work on Justice Story and Robert Gordon's still unpublished Holmes lectures at Harvard. *See* R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY (1985); R. Gordon, Lawyers as The American Aristocracy (Feb. 1985) (unpublished Holmes Lectures).

ideal types can be identified, and even Hamilton and Jefferson will not easily fit the Liberal or Republican models. These models capture only implicit tendencies, at best immanent in the thought of any one person. If, in 1720, attitudes towards commerce or property were fundamental in defining the Republican-Liberal or Court Party-Country Party dichotomy, these particular variables may have been relatively unimportant in 1800.[47] If one of the decisive questions in 1787 was whether there could be Republican government over a large territory, that question may have been insignificant in England twenty years earlier or in America twenty years later. In 1750, one's conception of law may have been relatively unimportant in defining the essence of Republicanism; in 1890, it may well have been at the core of the tradition.

Regardless of their posture on political issues at any particular time, both the Liberal and the Republican traditions have sought to appropriate law to their visions. In the Liberal tradition, a neutral state with its neutral law could provide the framework for a neutral market society. The Republican synthesis, however, viewed law as having an affirmative role in constituting a community. For example, as William Treanor has shown, the surprising absence of just compensation clauses in post-revolutionary state constitutions was based on powerful Republican communitarian conceptions of property.[48] The Republican communitarian model absorbed and modified the then widely accepted feudal-common law view that all property was held in trust for the king. Indeed, from this perspective, the contract clause decisions of the Marshall Court represent a significant shift; they are important in establishing a Liberal conception of the relationship between state and individual.[49] The Fifth Amendment to the federal Constitution, moreover, represents a dramatic Liberal reversal of the dominant conception of the relationship between the state and individual property holdings.[50]

In this light, the dissenting opinion of Justice Gibson of Pennsylvania in *Eakin v. Raub*,[51] opposing judicial review, becomes not some aberrational democratic protest but part of a more deeply rooted Republican conception of government; if the polity is not an arena of competing interests from which some individuals or interests need protection, but rather a forum through which individuals constitute themselves and achieve a pub-

47. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISCIPLINARY HIST. 119 (1972).

48. Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

49. *See* cases cited *supra* note 10.

50. *See, e.g.*, Harvey v. Thomas, 10 Watts 63, 66–67 (Pa. 1840); Case of the Philadelphia & T.R.R., 6 Whart. 25, 46 (Pa. 1840).

51. 12 Serg. & Rawle 330 (Pa. 1825).

lic good, it is difficult to justify judicial override of legislative action. The separation of powers and such oddities as the system of legislative review of judgments, widespread in the New England states between 1800 and 1825,[52] can also be seen as deriving from a Republican vision.

If the Liberal idea of law was that it was a necessary evil, the price that individuals needed to pay for a reasonable degree of security, the Republican vision of law was as normative and constitutive of culture, and as potentially positive and emancipatory. Law could create structures that enabled individuals and communities to fulfill their deepest aspirations. The twentieth century creation of a dichotomy between natural law and positive law has prevented us from capturing this Republican idea of law. The attack by Progressives on classical legal thought misleadingly charged late nineteenth century orthodoxy with a natural law position.[53] The positivist position of many Progressives kept them from appreciating that there were many normative elements built into legal categorization and legal reasoning—a famous constitutional law example being the Doctrine of Implied Limitations—that were not experienced as importing external higher law principles into the body of law.[54]

What is so striking about Holmesian legal positivism as expressed in *The Path of the Law*[55] is that it represents—at least at the explicit level—a dramatic reversal of the ordinary normative conception of law that has prevailed throughout most of American history. Holmes's prepositivist work, *The Common Law*, had shared the view held by many of his contemporaries that the common law was an expression of custom which itself had a normative and evolutionary character.[56] As Robert Cover demonstrated in *Justice Accused*, some anti-slavery judges were able to conceive of law as incorporating normative ideals while at the same time rejecting any appeal to higher law outside of the body of legal principles.[57]

In my view, the stark jurisprudential dichotomy between natural law and positive law is itself a twentieth century positivist creation that has kept us from seeing the way in which all legal structures inevitably embody normative positions. When one creates a pyramidal and categorical legal structure,[58] as late nineteenth century classical legal thought aspired

52. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Hamilton v. Hempsted, 3 Day 332 (Conn. 1809); Holden v. James, 11 Mass. 396 (1814); Dupy v. Wickwire, 1 D. Chip. 237 (Vt. 1814).

53. *See* C. HAINES, *supra* note 22, at 347-49.

54. *See* B. WRIGHT, *supra* note 22, at 280-81; Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

55. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

56. *See* O.W. HOLMES, THE COMMON LAW 5-6 (1963).

57. R. COVER, *supra* note 1, at 226-56.

58. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-94 (1976).

to do, one also becomes committed to deductive and formalistic legal reasoning. All legal questions become on-off questions, questions of kind. In contrast, when one conceives of legal phenomena along a horizontal continuum, as Holmes eventually did,[59] all legal questions become matters of degree, not of kind, and legal reasoning emphasizes balancing tests and trade-offs.

All legal systems have a legal architecture that categorizes and classifies legal phenomena. And every system of legal architecture incorporates deep into that structure a set of normative premises about the proper way to talk about law. Whether there are distinctively Republican or distinctively Liberal systems of legal architecture is a subject worthy of future scholarship. But that endeavor will be impeded if we remain stuck with the formalistic distinction between natural law and positivism.

We must become more self-conscious about legal historiography and the ways in which controversies over political and legal theory influence legal historical inquiry. It is time for us to bridge the chasm between legal theory and legal history.

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59. *See* Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 3 (1871); Holmes, *The Theory of Torts*, 7 AM. L. REV. 652 (1873).